

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

KEURIG, INCORPORATED,

Plaintiff,

v.

KRAFT FOODS GLOBAL, INC.,
TASSIMO CORPORATION, and
KRAFT FOODS INC.,

Defendants.

C.A. No. 07-17 (GMS)

JURY TRIAL DEMANDED

PUBLIC VERSION

**DEFENDANTS' REPLY IN SUPPORT OF MOTION *IN LIMINE* TO LIMIT EXPERT
TESTIMONY OF DR. ALEXANDER SLOCUM**

OF COUNSEL

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Dated: August 25, 2008
Public Version Dated: September 2, 2008
880808 / 31118

In its response (“Opp’n”), Keurig concedes both that Dr. Slocum is not a coffee expert and that Dr. Slocum did not expressly mention “aspect ratio” in either of his reports. Dr. Slocum, who is admittedly not an expert in the coffee or beverage fields, is not qualified under *Daubert* to provide expert testimony as to whether the prior art Kenco Singles cartridge (the “Singles cartridge”) produces a “beverage” and cannot provide a lay opinion under the guise of “expert” testimony. Further, Keurig attempts to equate Dr. Slocum’s aspect ratio theory with a single statement regarding burrowing made in his rebuttal report. Slocum Rebuttal Rep. (Ex. 1) at 25. Dr. Slocum’s theories of burrowing and aspect ratio, however, are distinct, and, thus, the burrowing statement is not sufficient identification of his aspect ratio theory. Thus, this Court should preclude Dr. Slocum from testifying as to these issues.

ARGUMENT

I. Dr. Slocum’s Testimony Related to “Beverage” Should Be Excluded.

As explained in the Defendants’ Motion *in Limine* to Preclude the Expert Testimony of Ted Lingle, testimony in which Ted Lingle construes the claim term “beverage” and sets criteria for determining whether a liquid constitutes a “beverage” under his claim construction is inadmissible. Yet, Dr. Slocum has indicated that he is relying on Mr. Lingle’s expert opinion. Slocum Depo. Tr. (Ex. 2) at 210:4-6. Dr. Slocum should not be permitted to provide testimony related to or relying upon Mr. Lingle’s inadmissible expert opinion. Nor should Keurig be permitted to indirectly provide Mr. Lingle’s inadmissible opinions through Dr. Slocum’s testimony. Keurig concedes that Dr. Slocum is not a coffee expert. Opp’n at 4. Nevertheless, it continues to seek to offer his opinion, which is based upon his lay palate¹, that the liquid produced by the Singles cartridge is not a “beverage.” *Id.*

¹ During his deposition, Dr. Slocum asserted that he would offer his lay opinion, relying on his lay palate, at trial whether the liquid produced was a beverage. Ex. 2 at 210:7-211:2.

Further, Dr. Slocum should be precluded from testifying regarding the measurement of the total dissolved solids (“TDS”) in liquids produced by the Singles cartridge using the same-side piercing method. The ‘762 patent does not mention TDS nor has Keurig established that one of ordinary skill in the consumer packaging art, when considering the plain and ordinary meaning of “beverage,” would use such measurement. Rather, TDS is one of the criteria set by Mr. Lingle. Second, as Dr. Slocum admitted, Mr. Lingle measured the TDS, not him. Ex. 2 at 113:14-18, 200:24-201:5. Dr. Slocum does not purport to be an expert with regard to TDS measurements or the use of TDS as a criteria to determine what constitutes a “beverage.” Thus, there is absolutely no basis for Dr. Slocum’s testimony as to Mr. Lingle’s TDS measurements.

Further, Dr. Slocum’s testimony regarding whether the liquid produced by the Singles cartridge is a “beverage” and regarding the TDS measurements of such liquids plainly fails to satisfy the *Daubert* standard for expert testimony, and cannot be used as a backdoor through which to offer Mr. Lingle’s inadmissible opinions. The Supreme Court requires that expert testimony be based on scientific knowledge derived by the scientific method. *Daubert v. Merrell Dow Pharms, Inc.*, 509 U.S. 579, 590 (1993). Because he is not an expert in the coffee field, Dr. Slocum’s testimony as to whether the liquid produced constitutes “coffee” is nothing more than unsupported speculation. Accordingly, it should be excluded under *Daubert*. Additionally, Dr. Slocum’s lay opinion as to whether the liquid produced constitutes “coffee” must be excluded under Rule 701 because Dr. Slocum is testifying as an expert. FED. R. EVID. 701 (stating that lay opinion testimony only is admissible “[i]f the witness is not testifying as an expert”). Therefore, this Court should preclude Dr. Slocum from offering such testimony.

II. Dr. Slocum’s Aspect Ratio Theory Was Not Identified Until His Deposition.

Keurig argues that Dr. Slocum’s aspect ratio theory “merely explains his description of the ‘burrowing’ phenomenon[,]” which was identified in his rebuttal report. Opp’n at 4.

Contrary to Keurig's assertions, the two theories are not the same. Dr. Slocum distinguished the burrowing phenomenon from the aspect ratio theory, stating that the aspect ratio problem existed in the absence of the burrowing phenomenon:

Q. Mm-hmm. Okay. If you -- if you pierced up here within the manifold, would you have the same problem?

A. I don't think you'd have the -- well, you wouldn't have the burrowing issue.

Q. Right.

A. What you have here now, as I mentioned earlier, this aspect ratio problem. Now you're really severe on your aspect ratio, because your piercing device is on the order of the size of this dimension, but the foil goes way off on the other sides, and the foil -- my experience in playing with these things is you get kind of a trough shape and then the fluid definitely squirts out.

Ex. 2 at 152:25-153:14 (emphasis added). The burrowing issue and the aspect ratio issue are not the same, and it cannot be maintained that the single-sentence reference to burrowing in Dr. Slocum's rebuttal report adequately identifies the aspect ratio theory for purposes of Rule 26. FED. R. CIV. P. 26(a)(2)(B). Further, if an expert fails to identify an issue in his reports, mentioning the undisclosed issue during deposition "does not serve to place . . . [the proffered] testimony within the scope of [the] expert report." *Forest Labs., Inc. v. Ivax Pharms., Inc.*, 237 F.R.D. 106, 113 (D. Del. 2006). Even if the issues were the same, which they clearly are not, Dr. Slocum never mentioned burrowing issue with respect to the '234 Patent in either of his reports, and, therefore, his opinion must be excluded with respect to the '234 Patent.

As Keurig conceded in its opposition, Dr. Slocum did not directly reference the aspect ratio theory in his reports. Instead, Dr. Slocum identified this theory for the first time during his deposition. Thus, Dr. Slocum's testimony as to the aspect ratio theory should be excluded.

CONCLUSION

For the foregoing reasons, Kraft respectfully requests that the Court grant its Motion *in Limine* to limit Dr. Slocum's expert testimony at trial.

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

CERTIFICATE OF SERVICE

I, David E. Moore, hereby certify that on September 2, 2008, the attached document was electronically filed with the Clerk of the Court using CM/ECF which will send notification to the registered attorney(s) of record that the document has been filed and is available for viewing and downloading.

I further certify that on September 2, 2008, the attached document was Electronically Mailed to the following person(s):

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EXHIBIT 1

**THIS EXHIBIT HAS BEEN
REDACTED IN ITS ENTIRETY**

EXHIBIT 2

1 UNITED STATES DISTRICT COURT
2 FOR THE DISTRICT OF DELAWARE

3 ----- x
4 KEURIG, INCORPORATED,

5 Plaintiff,

6 v.

7 KRAFT FOODS GLOBAL, INC., TASSIMO CORPORATION, and
8 KRAFT FOODS INC.,

9 Defendants.
10

11 Civil Action No. 07-CV-0017-GMS
12 ----- x

13 VIDEOTAPED DEPOSITION OF ALEXANDER H. SLOCUM

14 Wednesday, June 11, 2008

15 9:10 a.m. to 5:00 p.m.

16 WOLF, GREENFIELD & SACKS, P.C.

17 600 Atlantic Avenue

18 Boston, Massachusetts

19 Reporter: Marianne R. Wharram, CSR/RPR
20

21
22
23 ELLEN GRAUER COURT REPORTING CO. LLC

24 126 East 56th Street, Fifth Floor

25 New York, New York 10022

212-750-6434

REF: 87765

SLOCUM

A. -- you see on the far right-hand side there's that arrow --

Q. Yes.

A. -- coming up? So that diameter of that circle is -- that outer perimeter of that circle is what, when the piercer goes through the foil which covers the hole, it keeps moving forward until the -- the little -- I think it's an O-ring, whatever the structure is that pushes -- pushes down hard against that --

Q. Right.

A. -- and now the seal is formed by pushing hard against the foil, which is backed up by that perimeter of the hard plastic, and that's what forms a seal. I'm not just -- and there are other ways of sealing, but that's the way this particular cartridge allows me to pierce it to accommodate the inflow so I just don't get this violent squirting out ever.

Q. Okay. What other ways are there to seal?

A. What other ways are there to seal?

Q. Yes.

A. Well, for example, as I mentioned earlier, the K-cup, which pierces the foil and there is

SLOCUM

nothing behind it to push against --

Q. Right.

A. -- so then it has this rubber kind of like an inverted cone type lip seal. And I've designed a lot of seals in the past. I think I could design some O-ring-based systems, so that's my answer.

Q. So it's not necessary to have a structure abut against it to create a seal?

A. I think -- right. I could seal just like the K-cups do now without having that particular back-up, but this is one way to do it.

Q. Could you -- could you seal the Kenco Singles without a hard structure to abut against?

A. The reason I'm hesitating is if you look at a K-cup or -- let me point to the patent. The second embodiment, when I push down on the center, if this is a square lid -- the K-cup is a round lid which is a symmetric structure, so when you push on it, you'll get symmetric deformation and the ring is symmetric, and so everything -- you have a good change of every-- actually, it does seal well.

When you have a square, when you push on it, you tend to get folds. It's the same reason why it's hard to take a sheet of paper and fold it

SLOCUM

over a cone. And the more non-square it is, the harder it is, so that's why I can't answer yes or no on that. I -- I'd do my darnedest to try and I think there's probably a pretty good chance I could figure out how to, for example, adopt the Keurig nozzle and seal to work, to seal against the foil of a rectangular shape, for example, shown in the first embodiment.

Q. So if I understand you correctly, the absence of a hard surface to abut against is not fatal to the ability to pierce the foil to permit an inflow of liquid?

A. I don't -- I think the answer is correct. I don't think the patent requires -- and I actually don't think you have to have -- it depends what pressures you want to do. I don't think you have to have a hard abut.

Q. Now, if you would look at -- if you would look at the claim, look at page 3, first element. Said filter element being permeable to liquid to accommodate a flow of the beverage from said first chamber to said second chamber. Do you see that?

A. I do.

Q. And you opined that that is present; is

SLOCUM

that correct?

A. I do.

Q. And what did you do to make this determination?

A. Well, I -- I bought a Tassimo machine --

Q. Yes.

A. -- and I used it.

Q. Okay.

A. And it made coffee.

Q. Well, you say it made coffee. Why do you say it made coffee?

A. I drank it.

Q. Did you test it?

A. You mean with the TDS?

Q. Yes.

A. No, I did not. And -- okay. And is that the answer as far as --

Q. You said and something. What were you going to say?

A. Oh, and then I had taken apart the cartridges. Fluid goes in here, hence the coffee. The only way out is through that papery thing. And when it makes coffee, I get a liquid with, you know, some -- coffee has some -- grit is not the

SLOCUM

A. I don't know.

Q. Okay. It is clear -- it says it is clear from context that the laminated foil is intended to cover compartment, 21, only. The outlet, 37, if covered, would be covered by a separate foil. What do you mean it's clear from context the laminate foil is intended to cover compartment, 21, only?

A. They only talk about covering the coffee bed region with foil. I don't have any indication that the teaching says continue the foil and also cover outlet, 37.

Q. Well, doesn't it say, quote, in use, a laminated foil is sealed along the lower edge, 23, of the body portion, and isn't this part of 23, lower edge of the body portion?

A. Well, yes and no. Sure, you could seal it everywhere as we just said. I'm not precluded from running one strip of foil everywhere, but no in the context of someone practicing it. I'm only going to put the foil where I need the foil. And there's nothing that teaches me that I need the foil over there. And like, again, the Lambert cartridges, for example, don't use foil. The Rychiger ones do have a covering, although not foil, so sometimes

SLOCUM

you do and don't. This is the outlet, 37, you're talking about, right?

Q. Right.

A. That's what I'm saying. Sometimes as practiced in the art 37 is covered and sometimes it's not. And I'm saying 37 as in figuratively, not this particular patent.

Q. Okay. The -- now, in paragraph -- excuse me. In paragraph six you say, if you turn to page two, paragraph 6, second sentence, moreover, the lid that is disclosed in the '234 patent is not pierceable to accommodate an inflow of liquid, paren, i.e., capable of being pierced to permit a flow of liquid into, end quote, based on the Court's claim construction to brew a coffee beverage that can be extracted through the same lid as required by the asserted claims. Do you see that?

A. I do.

Q. Just so I understand, it's not -- you said the lid is not pierceable. Now, is it -- you say it's not pierceable to accommodate an inflow of liquid. Is it not capable of being punctured to allow inflow of liquid? I'm just trying to see

SLOCUM

where the dispute is.

A. Okay. I think earlier this morning we did kind of a mapping between the Singles cartridge and this cartridge where I pointed out that on Figure 4, which is the other side, that the castellations on the bottom form essentially the same function as the filter paper.

Q. Right.

A. So I read this in terms again of the function that this cartridge has to do when I read the claim. So where I think we will have a problem -- there's two problem areas with this design and if we use it with -- using the input thing to punch through the foil here. The first problem area that we discussed extensively earlier was the issue of do we have a leak or a weep versus a catastrophic failure and I think we addressed that already in terms of all the different possibilities, but making the beverage, then we're going to have the same burrowing issue here as we do the aspect ratio problem I see of injecting water in here directly as opposed to bringing this water in through this encircling manifold.

Q. Mm-hmm. Okay. If you -- if you pierced up

SLOCUM

here within the manifold, would you have the same problem?

A. I don't think you'd have the -- well, you wouldn't have the burrowing issue.

Q. Right.

A. What you have here now, as I mentioned earlier, this aspect ratio problem. Now you're really severe on your aspect ratio, because your piercing device is on the order of the size of this dimension, but the foil goes way off on the other sides, and the foil -- my experience in playing with these things is you get kind of a trough shape and then the fluid definitely squirts out.

Q. Wouldn't the fluid go along the manifold?

A. No, this is not the fluid squirting out -- I mean, the fluid would go along the manifold, but it's very hard to make a -- I was not able to make a seal on this just playing with -- on the Singles cartridges, because the Singles cartridges also have that -- I wish we had one here -- zone on this manifold side that you could pierce way off on the edge.

Q. Yeah, but if you pierced in here, in the center, okay, it would distribute along the

SLOCUM

A. Yeah, the thing doesn't function unless it's with a brewer.

Q. And it has to have the support of the clamping mechanism, doesn't it?

A. Yeah, you'd have to hold the -- you have to hold the thing in place.

Q. Okay. Now, paragraph -- okay. Now, you -- if you turn to page 14, paragraph 40, I have tested Singles cartridges under various conditions to evaluate that they meet these claim requirements, and I conclude they do not. I therefore disagree with Mr. Taylor's conclusion. What various conditions?

A. Well, let me go to my chart.

Q. Page 21? No, 23.

A. It was 23 in the other report, I think.

Q. Well, I have it on 23 here.

A. Oh, yes. Right. Thank you. Foil down with plate, foil down with plate with different pressures, then I did up with plate and I did two different pressures, two different runs. Or excuse me; nominally the same pressure, but two runs, foil up with plate at a low pressure, then vertical, so I did all these different conditions in my table

SLOCUM

here.

Q. Okay. Looking at tests 6 and 7 --

A. Mm-hmm.

Q. -- you tested at 3.1 PSI and at 15 PSI; is that correct?

A. Correct.

Q. How did you decide on those pressures?

A. What I did was I played with pressure to get a cup of coffee in what was a reasonable time, and if I recall correctly, I asked -- I think the Keurig device uses -- is a low pressure device. It's like around the 3 PSI. The higher pressure came from -- I believe that was one of the depositions and -- and I think that was actually even higher, like the 20 PSI. But that -- I can't remember which of the Kraft people said their Tassimo runs around 20 something, but you know, I stepped things up. You always start low and go higher, and in my -- remember I said earlier I did these preliminary tests to see what would happen, because I wanted to do the actual coffee tests and I wanted to be prepared. And above 15 PSI, I would typically get violent spurting. And I did not want to be playing with the hot water where I would get

SLOCUM

violent spurting.

Q. Okay, but what about below 15?

A. I would get spurting, but not typically violent spurting.

Q. At what PSI's?

A. Well, sometimes it would spurt at 3 PSI, sometimes it would weep.

Q. Okay. I'm sorry. Sometimes it would spurt at 3 and sometimes it would weep? Is that what you just said?

A. Yes.

Q. So that indicates that you did more than one test at 3.1 PSI?

A. This is just where I did the total dissolved solids. I also did tests -- let me see where -- where I just used the cold liquid.

Q. After this report, what did you do? Did you do any more tests at 3 PSI with a hot liquid?

A. When I did my initial test for set-up, I did 3 PSI and I kept increasing it until I got to 15, and then it routinely would spurt and then I was like I'm not going to go any higher.

Q. Go ahead. I'm sorry.

A. The only tests I did at the low and the

SLOCUM

higher -- you know, the 15, where I actually was able to measure the TDS, that's when I was actually with Mr. Lingle, because he's the person who does those tests.

Q. Okay. And these were all the tests that you did with Mr. Lingle, or did you do more with Mr. Lingle?

A. There may have been one or two other ones where we were -- and then something went spliff and we wouldn't be able to get a full cup, so I don't know, maybe again as many where we couldn't get a full cup, because it would spurt. And part of my thing was I needed to make a full cup of coffee in this reasonable-ish time, because I'm playing brewer, and can I actually make this beverage using the Singles cartridge.

Q. So one of the requirements is a full cup, right?

A. When I was not able to get a full cup --

Q. Right.

A. -- yeah, that would be a requirement, because then I had a catastrophic failure.

Q. It's not because you thought that the patent required a full cup?

1 SLOCUM
 2 person. I don't buy espressos. I'm not really in
 3 the mud -- the mud zone.
 4 Q. So is your opinion based on your personal
 5 taste, or is it based on what Mr. Lingle told you?
 6 A. Both.
 7 Q. Okay. And are you going to testify at
 8 trial, render an opinion as to whether this
 9 resulting beverage in test six, say, was a beverage
 10 or not?
 11 A. To my lay palate --
 12 Q. Right.
 13 A. -- it's not.
 14 Q. Okay, but I'm asking you are you going to
 15 offer -- render an opinion at trial whether it was
 16 a beverage or not?
 17 A. If I'm asked at trial --
 18 Q. Yes.
 19 A. -- was six a beverage or not --
 20 Q. Right.
 21 A. -- I will say to my lay palate it was not.
 22 Q. So you're not an expert on that; is that
 23 correct?
 24 A. Right. That's why I said my lay palate. I
 25 am not an expert on that. Mr. Lingle is the

1 SLOCUM
 2 expert.
 3 Q. Okay. So one of ordinary skill in the art,
 4 if they didn't have Mr. Lingle next to them, would
 5 have to rely on their own taste preference; is that
 6 correct?
 7 MR. RADER: Objection to form.
 8 A. Yeah, there is -- sorry.
 9 MR. RADER: Go ahead.
 10 A. There they'd get other lay people around,
 11 typical consumers, people in the office and say
 12 what do you think of this. I would never design
 13 something or release something like this that was
 14 just based on my lonesome. You've got to get some
 15 -- some data or have an acknowledged expert who
 16 will say -- who does have a lot of experience about
 17 what's acceptable.
 18 Q. (BY MR. SCHLITZ) And if there's data that
 19 -- if you were presented with data that says that
 20 consumers find acceptable a beverage that is 750
 21 TDS, let's say, then you would say okay, that's a
 22 beverage?
 23 MR. RADER: Objection to form.
 24 A. Yeah, if -- when you say if I was presented
 25 with data that said consumers said, so I'm assuming

1 SLOCUM
 2 Mr. -- a Mr. Lingle tells me that if you can
 3 consistently brew a better than 750, if that's a
 4 beverage, I'm happy to say okay, you're the expert
 5 telling me what will sell.
 6 Q. No, I'm saying if you don't have a
 7 Mr. Lingle, you'd go to people in the office or
 8 you'd rely on data, consumer data?
 9 A. Correct.
 10 Q. And I'm saying if you were presented with
 11 consumer data that said that some people find a
 12 beverage that has TDS of whatever number I gave
 13 you --
 14 A. 750.
 15 Q. -- 750, would you then say, well, that's a
 16 beverage?
 17 MR. RADER: Objection to form. Go
 18 ahead.
 19 A. I guess so.
 20 Q. (BY MR. SCHLITZ) Okay. Now, if you turn
 21 to paragraphs 41 and 42 of your opinion, 41 says a
 22 Singles cartridge or single-serve beverage
 23 cartridge is designed to be inserted into a Singles
 24 brewing machine to produce a cup of coffee.
 25 Diagram -- the Kraft diagram below shows how the

1 SLOCUM
 2 Kenco Singles cartridge works. And so you
 3 considered how the Singles was intended to work; is
 4 that correct?
 5 A. Correct.
 6 Q. And it was intended to work in the
 7 horizontal position, right?
 8 A. Correct.
 9 Q. Okay. The Singles cartridge has a
 10 generally rectangular hard plastic shell with an
 11 opening on one side through which the coffee
 12 grounds are introduced during manufacture, and it
 13 goes on and you talk -- essentially, you describe
 14 its intended use; is that correct?
 15 A. Correct.
 16 Q. What is the significance of its intended
 17 use to your formulation of your opinion that the
 18 Singles cartridge is not capable of being -- the
 19 lid of the Singles cartridge is not pierceable --
 20 capable of being pierced to permit an inflow of
 21 liquid?
 22 A. Well, I look at the performance of the
 23 device, the cartridge, and the way it was intended
 24 to be used, and this is what I get out of it. And
 25 then I use it in this modified way that I was